



THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

MISCELLANEOUS APPLICATION NO. HCT-12-CV-MA-0030 OF 2014

(ARISING FROM CIVIL SUIT NO. 0018 OF 2012)

ANKOLE RIVERLINE HOTEL LTD ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. UGANDA BREWERIES LTD

2. GUARANTY TRUST BANK (U) LTD ::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BYABAKAMA MUGENYI SIMON

RULING

The application was brought under O. 1 r. 3, O. 6 r. 19 of the Civil Procedure Rules (CPR), S. 98 of the Civil Procedure Act (CPA) and s. 33 of the Judicature Act, wherein the applicant seeks the orders that:-

1. The applicant be granted leave to amend the plaint and join the 2nd respondent herein as the second defendant in the head suit.
2. Pending the above said amendment, the 2nd respondent be restrained from disposing of the applicant's property comprised in FRV 1235 Folio 6 Plots 89-91 situated on Kabale Road, Mbarara.
3. The costs of this application be granted for.

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The grounds briefly are that:-

- a. The applicant obtained credit facilities from the 2nd respondent to finance a Distributorship agreement executed with the 1st respondent.

- b. During the subsistence of the said distributorship, the 1st respondent billed and/or invoiced the applicant for products that were never supplied and the applicant applied the proceeds of the facility extended by the 2nd respondent to pay for the said unsupplied goods.
- c. Subsequently, a mismatch was noticed between the products actually supplied and the demands contained in the invoices whereupon a forensic audit was conducted which revealed a shortfall of approximately shs. 1,316,360,129/= as owed to the applicant.
- d. In a bid to scuttle recovery and/or reconciliation of the above figures, the 1st respondent aware that the 2nd respondent had guaranteed the applicant's payments, moved to have the 2nd respondent effect all purported outstanding payments immediately hence the applicant filing the head suit.
- e. Pending adjudication by this court on whether it was justifiable for the 1st respondent to continue receiving payments out of monies provided by the 2nd respondent for no goods supplied, the 2nd respondent has now moved to have the applicant's property comprised in FRV 1235 Folio 6 Plots 89-91 in Mbarara sold to recover the monies paid to the 1st respondent.
- f. The above said property was one of the securities availed by the applicant to the 2nd respondent for the facility out of which the 1st respondent was being routinely paid.
- g. It is therefore in the interests of justice that the 2nd respondent be joined to the suit not only to secure repayment of the facility which was abused by the 1st respondent but also to salvage the applicant's property from unwarranted sale as a result of the 1st respondent's omissions and/or commissions.

The application was supported by the affidavit of Hygin Twongyeirwe Kururagire, the managing director of the applicant company. No affidavits in reply were filed on behalf of the respondents although they were served.

The applicant was represented by Mr. Tonny Arinaitwe who filed written submissions.

Counsel submitted that the joinder of the 2nd respondent to the suit is necessary so that the claims for money accruing from the beer distributorship transactions and dealings involving the three parties herein be resolved. That since each of the three parties makes claim for money which arises either as supply or financing for such supply, or otherwise a dispute that no such supply was made, this leaves no doubt that all claims by either party rotate around one or related transactions within the meaning of O.1 r. 3 of the CPR.

Counsel further asked court to grant an interim injunction restraining the 2nd respondent from sale of the collateral security comprised in plots 89-91, Kabale Road, Mbarara Municipality. In the event the 2nd respondent defeats the applicant in the main suit, it would recover all her money with interest.

According to O.1 r. 10 (2) of the CPR the court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

The purpose of the said rule is to secure the determination of all disputes relating to the same subject matter without delay and expense of separate actions – see ***MONTGOMERY VERSUS FOY (1895) 2 Q.B 321.***

The unchallenged affidavit evidence of the applicant reveals the applicant executed a distribution agreement with the 1st respondent to distribute the latter's products in Masindi. In accordance with the terms of the distribution agreement, the applicant made arrangement with the predecessor to the respondent bank to secure the 1st respondent's payments for all amounts that

may become due from the applicant to the 1st respondent. The predecessor to the 2nd respondent also executed a bank guarantee undertaking to pay the 1st respondent shs. 300,000,000/= in the event of the applicant defaulting on the remittance to the 1st respondent for its products supplied on credit.

It is also contended that after some time the 2nd respondent started invoicing the applicant company for products not supplied and the applicant effected payments for the unsupplied products to the 1st respondent. A forensic audit by the applicant revealed the applicant had effected payments for unsupplied products to the tune of over one billion shillings. The resultant dispute led the 1st respondent to take steps to realize the bank guarantee, prompting the applicant to file Civil Suit No. 0018/2012 against the 1st respondent.

On realizing that the dispute between the applicant and 1st respondent, the 2nd respondent moved to dispose off the applicant's property (collateral security), by advertising it for sale, on grounds of failure to service the bank obligations.

The applicant therefore seeks to join the 2nd respondent as a party/defendant to the suit and have the plaint amended as well.

It is trite, amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side and, there is no injustice if the other side can be compensated by way of costs. The court will not refuse to allow an amendment simply because it introduces a new case. But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment the subject matter of the suit. the court will refuse leave to amend whereby the amendment would change the action into one of a substantially different character, or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, eg. by depriving him of a defence of limitation accrued since the issue of the writ – see ***EASTERN BAKERY VERSUS CASTELINO (1958) E.A 461.***

In the matter before this court, there is a financial dispute over products allegedly supplied by the 1st respondent to the applicant whose payment was guaranteed by the 2nd respondent bank. The question of who is liable for the disputed amount can only be effectually and completely resolved with all the players being in the suit. This would avoid a multiplicity of suits with the applicant having to proceed against the 2nd respondent bank or vice-versa.

In the premises, I am satisfied the conjoined facts of this case do warrant a joinder of Guaranty Trust Bank (U) Ltd. The application is accordingly allowed by granting the following orders:-

1. The applicant shall join the 2nd respondent as a defendant to the main suit.
2. Leave is granted to the applicant to amend and file its plaint within 15 (fifteen) days of this order.
3. Court makes no order to costs since none of the respondents filed a reply.

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BYABAKAMA MUGENYI SIMON
JUDGE
11-1-2016